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No. 06-643

IN THE
Supreme Court of the United States

STACEY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

I. THE SEVENTH CIRCUIT'S VIOLATION OF RULE 34(a)(2) WARRANTS REVIEW 2

II. THE CONFLICT WITH SIXTH CIRCUIT AUTHORITY IS RIPE FOR REVIEW 4

A. The Government Cannot Distinguish *Clinkscale* on *Strickland* Attorney Performance Grounds 4

B. The Government Cannot Distinguish *Clinkscale* on *Strickland* Prejudice Grounds 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Anderer v. Jones,
412 F.3d 794 (7th Cir. 2005) 3

Anderson v. Butler,
858 F.2d 16 (1st Cir. 1988) 10

Clinkscale v. Carter,
375 F.3d 430 (6th Cir. 2004) ..... *passim*

Davis v. Lambert,
388 F.3d 1052 (7th Cir. 2004) 8

Harris v. Reed,
894 F.2d 871 (7th Cir. 1990) 5, 10

Kimmelman v. Morrison,
477 U.S. 365 (1986) 5

Massaro v. United States,
538 U.S. 500 (2003) 9

McConville v. SEC,
No. 05-3510, 2007 U.S. App. LEXIS 926
(7th Cir. Jan. 17, 2007) (order) 3

Ortega-Rodriguez v. United States,
507 U.S. 234 (1993) 3

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 5

Stewart v. Wolfenbarger,
468 F.3d 338 (6th Cir. 2006) 4, 6, 7, 10

Strickland v. Washington,
466 U.S. 668 (1984) ..... *passim*

United States v. Miller,
327 F.3d 598 (7th Cir. 2003) 8, 9

Wiggins v. Smith,
539 U.S. 510 (2003) 9

Williams v. Taylor,
529 U.S. 362 (2000) 9

STATUTES

28 U.S.C. § 2255 8-10

FEDERAL RULES OF PROCEDURE

Fed. R. App. P. 34(a)(2) 1-3, 10

Fed. R. Crim. P. 12.1 4

REPLY BRIEF FOR THE PETITIONER

The government does not and cannot deny that the Seventh Circuit violated Rule 34(a)(2) of the Federal Rules of Appellate Procedure by refusing to hold oral argument. Instead, the government attempts to minimize the significance of the Rule violation. (Opp. 5-6.) The government's position, however, is inconsistent with the policy choices made by Congress in enacting the Rule (Pet. 11-13), and with the widely accepted principle that oral argument is an invaluable part of the appellate process as demonstrated by the broad range of *amicus* support for the Petition by former judges of the United States Courts of Appeals, innocence projects, and a prominent bar association. Moreover, the government's Opposition neither mentions nor distinguishes the authority cited by Miller in his Petition that the Rule violation constitutes a deprivation of procedural due process. (Pet. 9-11.) Of note, the government takes this position while, at the same time, admitting that "the virtues of oral argument on appellate decision-making . . . cannot be disputed." (Opp. 6 n.3.)

The benefits of oral argument, and in particular the opportunity to enhance the appellate court's decision-making, were needed in Miller's case. When the Seventh Circuit denied Miller oral argument in violation of Rule 34(a)(2), and summarily affirmed and adopted the opinion of the district court over Judge Ripple's dissent, the panel majority disregarded on point authority from the Sixth Circuit that dictates a new trial on the same claim and similar facts. *See Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004). Indeed, it was not until the government filed its Opposition before this Court that Miller's arguments regarding *Clinkscale* were addressed for the first time. The government's inability to meaningfully distinguish this authority exposes the inequity that results from the erosion of Rule 34(a)(2), and underscores the need for this Court to grant the Petition.

I. THE SEVENTH CIRCUIT'S VIOLATION OF RULE 34(a)(2) WARRANTS REVIEW

The government's attempts to downplay the significance of the Seventh Circuit's violation of Rule 34(a)(2) are fundamentally flawed.

The government's first argument, that the "court of appeals' unpublished summary order does not establish circuit precedent on the application of Rule 34(a)(2)," is immaterial due to the nature of the Rule violation at issue. (Opp. 5.) The decision being challenged was not the subject of the parties' briefing before the Seventh Circuit, as is likely often the case with respect to the application of a rule that concerns the inner workings of an appellate court. Moreover, because "the Rule does not require a vote open to public scrutiny . . . violations are only exposed through the rare circumstance of a judge's written dissent, as occurred here." (Brief of Former Judges of the United States Courts of Appeals as *Amici Curiae* in Support of Petitioner, at 12 (filed Jan. 31, 2007).) Thus, contrary to the government's basic contention, this case presents a rare opportunity for this Court to exercise its supervisory power and address a growing problem across the circuits. (*See* Pet. 13-14 (discussing the magnitude of Rule 34(a)(2) violations); *see also* Brief of *Amicus Curiae* Northwestern University's Center on Wrongful Convictions and Other Innocence Projects in Support of Petitioner, at 15-16 (filed Feb. 7, 2007) (discussing how federal courts of appeals are denying oral argument with increasing frequency, particularly on collateral review).)

The government's contention that "the focus of [Judge Ripple's] dissent was not on the question of whether oral argument should (or must) be held" is simply inaccurate. (Opp. 5.) The summation of Judge Ripple's entire dissent was that he "would set this case for oral argument in due course." (Pet. App. 18a.)

Next, the government asserts that "[r]emanding this case for the court of appeals to reconsider whether to hold oral argument would serve no cognizable purpose" because no judges voted in favor of rehearing or rehearing en banc.

(Opp. 5.) As part of this argument, the government states that "even the dissenting judge on the panel is evidently now of the view that oral argument need not be held, or at least would serve no constructive purpose."[1] (Opp. 6.) This argument also lacks merit.

As an initial matter, the government's argument ignores this Court's power to ensure that the Seventh Circuit properly follows Rule 34(a)(2). Moreover, the government's hypothesis concerning Judge Ripple's vote on rehearing or rehearing en banc is pure speculation, and it ignores the fact that Judge Ripple did not amend his dissent in response to Petitioner's Rule 34(a)(2) argument, a convention panels including Judge Ripple have previously employed in other appeals. *See McConville v. SEC*, No. 05-3510, U.S. App. LEXIS 926, at 1 (7th Cir. Jan. 17, 2007) (order) ("On consideration of the petition for rehearing, the slip opinion issued . . . is hereby amended . . . ."); *Anderer v. Jones*, 412 F.3d 794, 794 (7th Cir. 2005) ("In response to [a petition for rehearing and rehearing en banc], the panel amends its opinion . . . .").

At bottom, the Seventh Circuit's failure to ensure compliance with Rule 34(a)(2) on rehearing or rehearing en banc demonstrates "either deficiencies in [the Seventh Circuit's] internal operating procedures or a failure to recognize the importance of complying with the Rule 34(a)(2) unanimity mandate." (Brief of *Amicus Curiae* Chicago

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[1] The authority the government cites in support of its attempt to diminish the significance of the Rule 34(a)(2) violation, *Ortega-Rodriguez v. United States*, 507 U.S. 234, 251 n.24 (1993), is irrelevant. That case does not address Rule 34 or oral argument. Similarly, the government's citation to a handful of cases in a footnote in response to the amicus brief by former judges of the federal courts of appeals, for the proposition that "this Court not infrequently issues summary reversals over the dissents of Justices who would set the cases for briefing and argument," also misses the point. The government's cases do nothing to take away from the respect that this Court generally exhibits for the rights of judges in the minority and oral argument. Moreover, this Court does not have an equivalent to Rule 34(a)(2) instituted by Congress and the Federal Judiciary requiring it to defer to a minority judge's desire for oral argument.

Coun[illegible]of Lawyers in Support of Petitioner, at 9 (filed Feb. 7, 2007)). "Either way, this case, which involves substantial liberty interests, presents an ideal opportunity to remind both the Seventh Circuit, and the courts of appeals as a whole, that oral argument is an important part of the appellate process that *cannot* be dispensed with unless the panel hearing the case unanimously agrees." (*Id.* (emphasis in original).)

II. THE CONFLICT WITH SIXTH CIRCUIT AUTHORITY IS RIPE FOR REVIEW

The government's attempts to distinguish *Clinkscale* in its Opposition, often through attacks on the merits of Miller's ineffective assistance of counsel claim, are unconvincing.

A. The Government Cannot Distinguish *Clinkscale* on *Strickland* Attorney Performance Grounds

The government first endeavors to distinguish *Clinkscale* by arguing that "[i]n *Clinkscale*, unlike here, counsel failed entirely to file a notice of alibi witnesses," whereas in Miller's case, counsel "had chosen not to amend his notice of alibi to add [the three witnesses]." (Opp. 8.) This argument is contrary to the record of both cases.

To begin, the government's argument rests upon its erroneous assertion that Clinkscale's counsel "failed entirely to file a notice of alibi." (Opp. 8.) As stated in *Clinkscale*, "after the jury was empanelled, Clinkscale's trial attorneys filed a written notice of alibi and identified [three witnesses] as potential alibi witnesses," but the trial judge refused to allow the alibi testimony "because the notice of alibi was not filed seven days prior to trial, as required by Rule 12.1." *Clinkscale*, 375 F.3d at 434-35. Thus, *Clinkscale* actually turned on the failure by counsel to comply with applicable notice of alibi law, resulting in the exclusion of alibi witnesses. *See Stewart v. Wolfenbarger*, 468 F.3d 338, 355 (6th Cir. 2006) ("An objectively reasonable attorney would have complied with Michigan law in providing the correct alibi notice. This is especially true because Petitioner's entire defense rested upon alibi." (citing *Clinkscale*, 375 F.3d at 443)).

The government's argument also fails because it incorrectly relies upon the notion that Miller's trial counsel made a strategic decision to "include[] two alibi witnesses in his notice of alibi" and "not to amend his notice of alibi to add [the three other witnesses]." (Opp. 8; *see id.* (raising the same argument regarding the merits: "[t]he circumstances indicate that counsel's decision was a tactical judgment concerning which witnesses were most persuasive and least vulnerable to impeachment").) This position fails for three reasons.

First, the government's argument as to alibi witnesses Pollard and Jordan is unsuccessful because it is a *post hoc* rationalization of Cooley's performance that is unsupported by the record. *See Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." (citing *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986))). Despite the government's claim that "counsel's decision was a tactical judgment concerning which witnesses were most persuasive and least vulnerable to impeachment" (Opp. 8), the record contains ample evidence through Cooley's motion for issuance of trial subpoenas that Cooley intended to call Pollard and Jordan to provide alibi testimony: "Pollard and Jordan will testify that, while not actually with the defendant at the specific time of the alleged sale in Madison, they both had seen him in Chicago on May 10, 2001, as well as throughout the week of May 7, 2001." (R. 47 at 1-2.) In fact, the record indicates that Cooley had no other purpose for calling Pollard and Jordan except for this alibi testimony.

Second, the government's *post hoc* justification of Cooley's performance also fails as to alibi witness Ware, because a decision by Cooley not to timely provide notice of her would have been objectively unreasonable and thereby constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). The government ignores the fact that

F.3d at 360 ("Like the petitioner in *Clinkscale*, Petitioner was forced to present uncorroborated testimony for his only defense, alibi, and this lack of corroboration 'must have significantly affected the jury's assessment of' Petitioner's guilt.") (citation omitted).

The government's second argument, that in *Clinkscale* "the prosecution's identification testimony was 'highly suspect,'" also does not distinguish the two cases, because the identification evidence against Miller was also questionable. As explained in broader scope and detail in the Petition (Pet. 18), and altogether ignored by the government, the identification evidence presented at Miller's trial was thin because, *inter alia*, the undercover police officer who identified Miller on the day of the transactions at issue, Gonzalez, made his identification at police offices from a photograph array that contained eleven photographs, all of which were of Miller.[2] Moreover, Miller's former co-defendant received substantial benefits from the government for his testimony and reviewed police reports describing Gonzalez's version of the events prior to testifying at trial.

The government's next attempt to distinguish *Clinkscale* also fails because it incorrectly relies upon the Seventh Circuit's "determin[ation] in petitioner's direct appeal that the additional alibi witnesses would not have affected the result at trial." (Opp. 8.) The government takes this same position elsewhere in its Opposition when it argues that Miller cannot establish prejudice because "in denying petitioner's claim that his trial counsel should have been granted an additional continuance . . . [t]he court applied the same prejudice standard that would apply to petitioner's ineffective assistance claim." (Opp. 7.) This argument fails for three reasons.

First, the government's argument ignores the Seventh Circuit's express limitation of its decision on direct appeal.

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[2] In its statement of the case, the government asserts that "On May 7, 2001, [Gonzalez] met [Miller] while purchasing crack cocaine from Winfield at Winfield's apartment." The government's statement ignores the fact that Gonzalez could not identify Miller on May 7 as the person on Winfield's couch. (R. 116 at 28:23-29:5.)

Third, the government's argument contravenes the basic premise that a proper *Strickland* analysis requires the reviewing court to reweigh the government's evidence against the totality of the defendant's evidence. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). In order to ensure that a defendant has an opportunity to introduce all evidence of deficient attorney performance and prejudice, this Court held that a defendant may properly bring a *Strickland* claim in a § 2255 proceeding. *See Massaro v. United States*, 538 U.S. 500, 504-505 (2003) ("The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis."). In fact, the Seventh Circuit's prejudice findings on direct appeal were premised on the lack of evidence presented to them by counsel on direct appeal regarding the alibi witnesses' testimony. *See Miller*, 327 F.3d at 602, 605. Despite this limitation, the government now seeks to preclude Miller from introducing both evidence outside the record (the four proffered affidavits, which should be admitted, and additional testimony at an evidentiary hearing, if deemed necessary), and evidence in the record that his attorneys on direct appeal did not present when they were arguing a different claim. Contrary to the government's assertion, this Court has made clear that Miller may bring his ineffective assistance of counsel claim in a § 2255 petition and have the totality of the evidence of deficient attorney performance and prejudice weighed by the courts.

The government's final attempt to distinguish *Clinkscale* on prejudice grounds, "that the jury heard testimony to the effect that petitioner 'inten[ded] to produce false alibi witnesses'" (Opp. 8-9), is also unconvincing. The testimony at issue came from Winfield (Pet. 5), which is not surprising given the considerable issues surrounding his testimony. Moreover, even if Detective Twing's testimony that Miller "could control what people say" (R. 118 at 122-24), is true, it is merely character evidence from a previous attempt by Miller to provide assistance to the police to solve an unrelated case (in which Miller was not charged). It does not demonstrate that Miller persuaded the uncalled alibi

Respectfully submitted,

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